LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 5 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 647

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCOTT W. LUCAS
JOSEPH B. FRIEDMAN
1028 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for South Florida Television Corporation

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	19

Appendix A—Opinion of the Court of Appeals	1a
Appendix B—Decision of the Federal Communications Commission	6a
Appendix C—Statute Involved	28a
Appendix D—FCC Policy Statement on Comparative Broadcast Hearings	31a

CITATIONS

CASES:

Ashbacker Radio Corp. v. *FCC*, 326 U.S. 327 (1945)	14
Charles County Broadcasting, Inc., 4 Pike & Fischer Radio Reg. 2d 196 (1965)	9
Churchill Tabernacle v. *FCC*, 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947)	9
Community Broadcasting Co. v. *FCC*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960)	9, 15, 17
Evangelical Lutheran Synod v. *FCC*, 70 App. D.C. 270, 105 F. 2d 793 (1939)	8
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)	14
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	13

Page

L. B. Wilson, Inc., 20 Pike & Fischer Radio Reg. 736b (1962) 4
L. B. Wilson, Inc. v. *FCC*, 83 U.S. App. D.C. 176, 170 F. 2d 793 (1948) 9
Public Service Television, Inc. v. *FCC*, 115 U.S. App. D.C. 200, 317 F. 2d 900 (1962) 15
Sunbeam Television Corp., 38 F.C.C. 805 (1965) 9
WHDH, Inc., FCC Docket No. 15204 et al. 9
WKAT, Inc., 29 F.C.C. 216 (1960) 4
WKAT, Inc., 22 F.C.C. 117 (1957) 3
WKAT, Inc. v. *FCC*, 111 U.S. App. D.C. 253, 296 F. 2d 374 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *FCC*, 368 U.S. 841 (1962) 4
WKAT, Inc. v. *FCC*, 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958) 3
Yankee Network v. *FCC*, 71 App. D.C. 11, 107 F. 2d 212 (1939) 9

STATUTE:

Communications Act of 1934, as amended:

Section 301, 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1964 ed.) 6, 10
Section 304, 48 Stat. 1083 (1934), 47 U.S.C. § 304 (1964 ed.) 10
Section 307, 48 Stat. 1083 (1934), 66 Stat. 714 (1952), 74 Stat. 889 (1960), 47 U.S.C. § 307 (1964 ed.) 10, 11, 14
Section 309, 74 Stat. 889 (1960), 47 U.S.C. § 309 (1964 ed.) 10, 14

MISCELLANEOUS:

"Broadcast Regulations and Intermedium Competition," 45 Va. L. Rev. 1104 (1959) 9
Communications Act Amendments, 1952; Senate Report No. 44, 82d Cong., 1st Sess. (Jan. 25, 1951), and House Report No. 1750, 82d Cong., 2d Sess. (April 8, 1952) 11
"Competition or Control II: Radio and Television Broadcasting," 107 U. Pa. L. Rev. 585 (1959) 9

Page

FCC, *Annual Report for Fiscal Year 1964* 9

FCC, *Policy Statement on Comparative Broadcast Hearings,* 5 Pike & Fischer Radio Reg. 2d 1901 (1965) 7, 8

Warner, *Radio and Television Law* (1949) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

SOUTH FLORIDA TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, and L. B. WILSON, INCORPORATED, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 8, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals, included within the certified record before this Court, is unreported and is printed in Appendix A hereto, *infra*. The decision of the Federal Communications Commission printed in Appendix B hereto, *infra*, is reported at 37 F.C.C.

511 (1964) and appears as such in the Supplemental Joint Appendix included within the certified record before this Court.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the Commission was entered on July 8, 1965. See Appendix A, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 47 U.S.C., Section 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission may in a comparative proceeding lawfully award a preference to a broadcast licensee by reference to its incumbency *per se* as a licensee, in the context of a case wherein this larger question is accentuated by the award of such a preference to a party whose limited operating authority was granted and justified for the purpose of continuing a previously existing television service pending the resolution of a comparative hearing to determine the best qualified applicant for the facility.

STATUTE INVOLVED

The provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C., Section 151 *et seq.*, which are involved are printed in Appendix C, *infra*.

STATEMENT

The Federal Communications Commission has denied petitioner's application for a permit to construct a television station on Channel 10 in Miami, Florida, and granted a mutually exclusive application for the chan-

nel filed by L. B. Wilson, Inc. Review of the Commission's decision was sought in the United States Court of Appeals for the District of Columbia Circuit, the jurisdiction of which was invoked under the provisions of Section 402(b)(1) and (c) of the Communications Act of 1934, as amended (66 Stat. 718, 47 U.S.C., Sections 402(b)(1) and (c)), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C., Section 1009). The Court of Appeals, with Judge Wright dissenting, affirmed the Commission's decision.

The material facts for the purpose of this petition may be summarized as follows:

In 1953 the Commission designated for hearing four mutually-exclusive applications for a permit to construct a television station on Channel 10 in Miami. In 1957 the Commission decided that Public Service Television, Inc., was the best qualified and L. B. Wilson, Inc., respondent herein, the least qualified of the four competing applicants. *WKAT, Inc.,* 22 F.C.C. 117, 209 (1957). Pursuant to this decision Public Service constructed a station and commenced operation.

During the pendency of an appeal from the Commission's decision granting Channel 10 to Public Service, a Congressional investigation revealed improper *ex parte* contacts with members of the Commission by one or more of the applicants. The case was remanded to the Commission at its request, *WKAT, Inc.* v. *FCC,* 103 U.S. App. D.C. 324, 258 F. 2d 418 (1958), whereupon the Commission found that all of the competing applicants except L. B. Wilson, Inc., were disqualified because of improper conduct. The result was a grant for a term of only four months "by de-

fault" of Wilson's application. *WKAT, Inc.*, 29 F.C.C. 216, 218 (1960).

The Court of Appeals approved the short-term authorization to Wilson in view of "the purpose of resolving a difficult practical problem," and in appreciation of the fact that

> ". . . a license to L. B. Wilson for a full term, without comparative consideration with any new applicant, would give Wilson a measure of advantage which, in view of all the surrounding circumstances, was deemed by the Commission to be unwise. We think the decision reached by the Commission was well within its authority and was a reasonable one." *WKAT, Inc.* v. *FCC*, 111 U.S. App. D.C. 253, 262-263, 296 F. 2d 374, 383-84 (1961), *cert. denied sub nom. Public Service Television, Inc.* v. *FCC*, 368 U.S. 841 (1962).

On February 16, 1962, the Commission issued an order stating that Wilson's four-month grant ended on March 20, 1962, and directed Wilson to file its application for renewal of license on or before that date. The order further announced that Channel 10 would be available for the filing of mutually-exclusive applications by new applicants. *L. B. Wilson, Inc.*, 20 Pike & Fischer Radio Reg. 736b, 736c (1962). Wilson and three other applicants, including petitioner, thereupon filed applications for Channel 10, and after an extensive hearing, the examiner rendered an Initial Decision (37 F.C.C. 534)[1] granting the application of petitioner and denying the applications of the other two applicants and Wilson. The examiner rated Wilson

[1] The Initial Decision of the hearing examiner, cited as such herein, may be found in the Supplemental Joint Appendix included within the certified record before this Court.

third among the four applicants. This decision was reversed by the Commission, which on July 29, 1964, granted the application of Wilson and denied that of the other two applicants and petitioner. Chairman E. William Henry dissented in favor of the petitioner. 37 F.C.C. 511.

The Commission, in awarding the grant to Wilson, found that Wilson enjoyed the "status of a licensee seeking renewal of its license in competition with others seeking the same facilities, albeit occupying a less favorable position than that which one seeking renewal normally holds." 37 F.C.C. at 515. It found all of the applicants "pre-eminently qualified" to operate a television station on Channel 10 in Miami, but found Wilson comparatively superior to the others. The Commission summarized its choice of Wilson as the most qualified under its comparative criteria because "it has achieved a combination of factors in no way approached by any other applicant. Majority stockholders having local residence, local civic association, and many years of broadcast experience would be integrated on a full-time basis," as well as assurance drawn from "its past broadcast record." *Id.* at 523. Chairman Henry, dissenting in favor of petitioner, found that unlike the petitioner's situation the local residence of the Wilson principals was "of an exceedingly recent vintage" and their interest in the area "has always depended upon the possibility that they might operate the very television station here in question." *Id.* at 532-33. Regarding Wilson's past broadcast record, Chairman Henry noted that it was being compiled during a period when the applicant was practically certain that it would be involved in a forthcoming comparative hearing. Under such circumstances,

Chairman Henry could not "accord the Wilson record even the slight significance which the majority strains to afford it." *Id.* at 533.

A majority of the Court of Appeals (see Appendix A, *infra.*), in affirming the Commission's award to Wilson, found no error in the fact Wilson was accorded the status of a licensee with "a less favorable position than a normal licensee. . . ." The Court held that the Commission's resolution of the various comparative issues represented a reasoned and reasonable judgment. To the contrary, however, Judge Wright, in dissent, stated that in according Wilson any favored status, the Commission violated Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C., Section 301, which provides that no license granted by the Commission "shall be construed to grant any right, beyond the terms, conditions and periods of the license." Judge Wright stated that the effect of the choice of Wilson over the new applicants, and similar holdings which give a preferential position to the license holder, "has been to make renewal of licenses almost automatic. . . ." The dissent would remand the case for reconsideration without any preference whatever to Wilson.

REASONS FOR GRANTING THE WRIT

Presented to the Court by this petition is an example of the consistent practice of the Federal Communications Commission to favor an incumbent licensee seeking a renewal of its license in a hearing with other applicants competing for the same facility. Both the example and the practice are accentuated by the facts of this case in that the "licensee" involved had been awarded essentially a temporary operating authority

to continue an existing television service pending the outcome of a comparative proceeding to determine the best qualified applicant to operate the facility in the public interest. Condonation of this practice by a divided Court of Appeals in this case is submitted as contrary to the provisions of the applicable Federal statute and violative of principles enunciated in decisions of this Court. A writ of certiorari should issue not only to correct these errors, but, more importantly, to settle paramount and recurring questions of Federal law which transcend this case and vitally affect the entire field of broadcasting.

1. The court below erred in condoning a practice of the Federal Communications Commission which violates the Communications Act.

The Commission's practice in renewing licenses is clear; indeed, it has asserted in this case that its position is to give a favored position to "one seeking renewal," 37 F.C.C. at 515. The Commission admits that "any grant [of a license] *necessarily* places the grantee in an advantageous position vis-a-vis those who seek facilities upon expiration of his license term." *Id.* at 514 (emphasis added).

The generality of this practice is clearly reflected in the Commission's Public Notice of July 28, 1965 (see Appendix D, *infra*), relative to comparative hearing criteria, wherein the fact of a satisfactory (as distinguished from an outstanding or unsatisfactory) broadcast record is announced as having little or no decisional significance in a comparative proceeding. *Policy Statement on Comparative Broadcast Hearings*, 5 Pike & Fischer Radio Reg. 2d 1901, 1912 (1965). Interestingly, the Commission's statement excepts from the enunciated comparative criteria cases involving "a li-

censee seeking renewal of its license." *Id.* at 1907 n. 1. Categorically rejecting the concept that incumbent licensees may legally be accorded a distinctive and preferred status, Commissioner Hyde, in dissenting from the policy statement, said:

> "I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to 'new' applicants, and that it 'does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license'. I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. . . ." *Id.* at 1917.

The existence of the practice favoring incumbent licensees and the questionable legality thereof could not be more clearly drawn.

The genesis of the Commission's practice is found not in the laws by which it regulates and to which it is subject; it is found rather in what might be termed a private doctrine of administrative equity which it has created. The distillate of the equities embraced by this doctrine is a recognition that large investments are made in broadcasting facilities and that if a licensee believed his investment would be endangered at renewal by a truly comparative hearing, it is not likely that large investments would be made. See *Evangelical Lutheran Synod* v. *FCC*, 70 App. D.C. 270, 272, 105 F. 2d 793, 795 (1939);

Yankee Network v. *FCC*, 71 App. D.C. 11, 107 F. 2d 212 (1939); *Churchill Tabernacle* v. *FCC*, 81 U.S. App. D.C. 411, 414, 160 F. 2d 244, 247 (1947); *L. B. Wilson, Inc.* v. *FCC*, 83 U.S. App. D.C. 176, 180, 170 F. 2d 793, 797 (1948); see also Warner, *Radio and Television Law* 720 (1949); "Broadcast Regulations and Intermedium Competition," 45 Va. L. Rev. 1104, 1127 (1959); and "Competition or Control II: Radio and Television Broadcasting," 107 U. of Pa. L. Rev. 585, 591 (1959).

Frequently, as in this case, the Commission observes that no decisive weight is given such equities, but "ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers, no matter how sincere their effort or intent," *Community Broadcasting Co.* v. *FCC*, 107 U.S. App. D.C. 95, 101, 274 F. 2d 753, 759 (1960), and, as Judge Wright recognized in his dissent, the "result of the Commission's practice giving the license holder a preference has been to make renewal of licenses almost automatic." See Appendix A, *infra*. This practice, in effect, gives the licensee a perpetual equity of enfranchisement.[2] The recognition of these "equities"

---

[2] The Commission's *Annual Report for Fiscal Year 1964* shows that in that year the Commission examined 1,809 applications of AM, FM and TV stations for renewal of licenses. Within that period the Commission refused renewals to only three licensees (Report, p. 53), all of which were found guilty of improper conduct. Only four renewal applications were the subject of hearings along with competing mutually-exclusive applications (Report, p. 54), and of those four proceedings set for comparative hearings, three resulted in renewals for the incumbent (see *Sunbeam Television Corp.*, 38 F.C.C. 805 (1965); *Charles County Broadcasting, Inc.*, 4 Pike & Fischer Radio Reg. 2d 196 (1965); and the instant case), and the fourth proceeding is still pending before the Commission (*WHDH, Inc.*, FCC Docket No. 15204, et al).

is particularly anomalous in the present case since each of the new applicants stated on the record that if it were successful in obtaining a grant it would be willing to purchase the transmitter building, tower, antenna and other equipment of L. B. Wilson, Inc., at a fair market price, or, in case of dispute, would accept an arbitrated price for such facilities. See 37 F.C.C. at 543 (Initial Decision).

This practice of favoring an incumbent seeking renewal of its license in competition with others is patently contrary to the requisites of the Communications Act of 1934, as amended. Such a practice ignores the prohibitions of Section 301, wherein the Congress has expressly provided for the use of broadcasting channels, "but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and *no such license is to be construed to create any right beyond the terms, conditions, and periods of the license.*" (Emphasis added.) Likewise, Sections 304 and 309(h) are being violated, for Section 304 requires as a condition precedent to any grant the signing of "a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise," and Section 309(h) specifies that the license *per se* is to contain the stated condition prohibiting the vesting of any right in the licensee beyond the terms of the license.

Moreover, favoring an incumbent is contrary to the Congressional mandate of Sections 307(a) and (d) of the Communications Act which require the Commission to grant licenses only in the "public interest, convenience and necessity." In the renewal context, the

Commission appears to deem the public interest standard as met by compliance with minimum technical, legal and financial screening requirements. That this is not the renewal standard contemplated by the Congress, in that the *same* standard is prescribed for both new applications and license-renewal applications, is documented by the legislative history of the 1952 amendment of Section 307(d). See Communications Act Amendments, 1952; Senate Report No. 44, 82d Cong. 1st Sess. (Jan. 25, 1951), and House Report No. 1750, 82d Cong., 2d Sess. (April 8, 1952)—to accompany S. 658.

The manner in which the Commission's uniform practice of favoring the incumbent was applied in the instant case is readily observable from the Commission's decision. The simple fact is that the qualifications of respondent L. B. Wilson, Inc., the temporary incumbent, which the Commission found to be decisive in its favor, were qualifications which it acquired only by virtue of the temporary operation. None of the stockholders of the incumbent licensee were residents of Miami prior to the temporary grant; none of them had participated in civic affairs in that community before that time; and none had any experience whatsoever in the operation of a television station. See 37 F.C.C. at 544-46 (Initial Decision). In contrast, all of the stockholders of petitioner were long-term residents of Miami, with established records of active civic participation apart from any interest in television; and three of the four stockholders had extensive television operational experience. See 37 F.C.C. at 556-60, 593 (Initial Decision). Nevertheless, the Commission preferred the short-term licensee by the process of putting on the scale the residence, civic participation, and tele-

vision experience of its stockholders which they acquired subsequent to the time that they received the four-month grant and which they would not have obtained except for the fact that they were incumbents of the channel. See 37 F.C.C. at 516, 517-19, 521-22.

The court below, in affirming the Commission's action, took the Commission at its word that the credit given to the incumbent licensee in the comparative category of past broadcasting performance due to its record in Miami was "minor in nature" (37 F.C.C. at 522) and was not directly considered in evaluating that applicant vis-a-vis the other applicants under other comparative categories. It is significant, however, that in finding the incumbent superior to petitioner in the critical factor of broadcast *experience* of its principals —as distinguished from broadcast *record*—the Commission emphasized the activities of the former's stockholders in the "operation of a television station in the Miami area," (37 F.C.C. at 518) notwithstanding the undisputed fact that their only experience in Miami or, indeed, anywhere else, was derived solely in connection with Channel 10. Moreover, in awarding credit for this experience, the Commission did not confine itself even to operations during the four-month period of its temporary grant. One of the major stockholders was credited with experience in the post of general manager of the Miami station (*ibid.*) even though he did not assume this post until after the end of the four-month period (see 37 F.C.C. at 545 (Initial Decision), R. 1-2 in Joint Appendix to briefs in court below).

The fact that the qualities upon which the Commission relied in finding for respondent L. B. Wilson, Inc. were attributable to incumbency *per se* was found by

the Court of Appeals not to be "an *unfair* advantage by virtue of being a license renewal applicant" (emphasis added). It is submitted, however, that an advantage ascribed to such circumstances is both unfair and unlawful in that such a favored position is prohibited by the Communications Act, and the decisions of this Court.

2. The decision of the Court below is in conflict with principles enunciated by this Court.

This Court has stated:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus *the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.*" *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940). (Emphasis added.)

The *Sanders* case stands for the principle, equally applicable here, that the purpose of the Communications Act is the protection of the public interest and not any private interest or equity of the broadcaster. More specifically, *Sanders* held that economic injury to an existing broadcaster is not to be considered independently by the Commission in granting or withholding a license to another broadcaster, *id.* at 476. This follows from the fact that "the Act recognizes that the field of broadcasting is one of free competition," *id.* at 474, and that, were it not so, Congress would have granted the Commission powers of control over rates, programs and other activities of the broadcasting business, *id.* at 476.

In the case at bar—and in license renewal cases in general—the Commission has ignored the Act's policy that there should be free competition for frequencies and that any injury to a previous licensee resulting therefrom is not, as such, to be considered by the Commission. The Commission's practice "apparently is responsible for the private sales of television stations in urban areas running into millions of dollars. * * * If the Commission would make clear, as the Congress has, that a licensee has no further rights beyond the term of its license, here would be no certainty that these public grants would continue to go to the prior license holder." Wright, J., dissenting below, Appendix A, *infra*.

This Court has also stated that the public interest, convenience and necessity standard of Sections 307(a) and (d) and 309(a) of the Act (see Appendix C, *infra*) require the selection of the applicant who, in the Commission's judgment, will *best* perform in the public interest. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2 (1940). Therefore, the Commission cannot justify a preference which is based in fact on protecting private investments as being for the public interest, convenience and necessity.

The lower court's disregard for the principles enunciated by this Court was noted by Judge Wright (see Appendix A, *infra*) when he observed that the practice of favoring an incumbent in a comparative proceeding is to make a mockery of the form of hearing required by the *Ashbacker* case, i.e., "Where two bona fide applicants are mutually exclusive the grant of one without hearing to both deprives the loser of the opportunity which Congress chose to give him," *Ashbacker*

Radio Corp. v. *FCC*, 326 U.S. 327, 333 (1945). In short, the hearing given petitioner in this case—and other applicants in renewal cases—is an "empty thing" (*id.* at 338) as petitioner has not been given the "truly comparative consideration," *Community Broadcasting Co.* v. *FCC*, 107 U.S. App. D.C. 95, 100, 274 F. 2d 753, 758 (1960), to which it is entitled.

3. The court below has affirmed a decision of the Federal Communications Commission wherein the elementary right to a fair and impartial hearing was denied.

Apart from the larger question of whether a broadcast licensee is entitled to any preference at license renewal time by reason of incumbency, this case under its facts presents a peculiarly aggravated aspect of the question which renders the judgment below a gross denial of due process.

The license here involved, it is to be recalled, was not for the normal three-year term according the licensee a degree of unilateral exclusivity in operation for such term. Indeed, the so-called "license" (essentially a temporary interim operating authority)[3] was awarded for only four months for the purpose of continuing an existing television service pending the filing of competing applications, in order that the applicant best qualified to operate in the public interest might be determined. Following a lengthy hearing, petitioner was overwhelmingly preferred by the hearing

[3] The Court of Appeals construed the operating authority as follows: "It [the Commission] awarded the permit to the sole remaining qualified applicant, L. B. Wilson, Inc., but upon certain conditions and with restrictions, which in effect made the permit a temporary authority." *Public Service Television, Inc.* v. *FCC*, 115 U.S. App. D.C. 200, 200-01, 317 F. 2d 900, 900-01 (1962).

examiner on the basis of its superior comparative qualifications. In reversing the hearing examiner, the Commission relied virtually exclusively upon attributes of respondent L. B. Wilson, Inc., which were gained as an incident of and were attributable to its temporary operation of the facility leading to and during the pendency of the comparative hearing.

Can it be said that petitioner has been accorded a fair and impartial hearing if its superior comparative qualifications are to be vitiated and overcome by qualifications of a competitor acquired as an incident of the passage of time occasioned by the hearing itself? The generation of superior qualifications by a process of chronological accretion related to the time required for the hearing cannot be squared, it is submitted, with due process of law.

Applicants with outstanding qualifications are impelled to seek broadcast facilities in the belief that the merit of their cause will be judged and vindicated in a hearing process that is fair. That such should be the case is distinctly in the public interest to insure that those best qualified do in fact seek broadcast facilities. *Can it be assumed, however, that petitioner, upon being effectively invited by the Commission to seek the facility involved pursuant to a hearing in which its comparative qualifications would be evaluated, would have filed therefor had it thought for a single moment that its competitor, who was temporarily operating the facility during the course of the hearing to determine the best qualified applicant, would acquire its "qualifications" as an incident of its concomitant operation of the facility?* To state the negative is to state the self-evident. The record of this case supports the categorical assertion that respondent L. B. Wilson, Inc.,

possessed no qualifications approaching those of petitioner apart from asserted qualifications acquired *after* its grant of temporary interim operating authority, denominated a "four-months license."

Inherent in the disturbing anomaly presented by this case is its incompatibility with the otherwise zealous manner in which the court below has sought to insure that a grantee of temporary operating authority pending the resolution of a comparative hearing shall acquire *no* comparative advantage by reason of the interim operation. *Community Broadcasting Co.* v. *FCC*, 107 U.S. App. D.C. 95, 101, 274 F. 2d 753, 759 (1960). That so contrary a result has been occasioned and condoned in the instant case is at once unexplained and inexplicable.

4. The question presented is of fundamental importance to the administration of the Communications Act and to the public which is the Act's beneficiary.

The preservation of competition in broadcasting and the requirement that broadcast facilities shall be granted solely by reference to the *public* interest are basic touchstones of the Communications Act. Neither purpose is served by a preferential policy favoring incumbent licensees.

The importance of settling the question presented by this petition is magnified in reflection of the fact that the choice broadcast channels are now occupied while the remaining allocations permitted by spectrum limitations are being rapidly assigned, all conspiring to a progressive diminution in any availabilities for newcomers irrespective of their outstanding qualifications. Manifestly, this increasingly means that in the future the only hope for significant and

meaningful improvement in the caliber of broadcast licensees will be limited to the occasion of license renewals (and of sale, to a lesser degree). Such improvement is unlikely, to say the least, if the established position of the existing broadcaster is circumscribed and insulated by a preferential status at license-renewal time.

The statutory restriction of broadcast licenses to limited periods evinces a settled Congressional purpose to obviate any possibility of established interests preempting the airways of the public domain and to insure a periodic reassessment of the stewardship and qualifications of those aspiring to a public trust. Implicit in the review and evaluation of license-renewal applications is the one meaningful and conclusive control to insure that broadcasters shall serve the public interest, to avoid the concentration of media interests, to deter monopolistic tendencies, and most significantly to accord the opportunity to those better qualified to succeed to and assume licensee responsibility. This Congressional policy is thwarted by a demonstrable practice of the Federal Communications Commission to prefer existing licensees at license-renewal time over competitors for the broadcast facilities involved. The result has been, on the one hand, self-satisfaction on the part of the existing broadcaster that his license will most assuredly be renewed and, on the other, a deterring of preeminently qualified entities to seek a facility in the almost certain knowledge that such effort would be futile. Neither result is in the public interest. This case affords the Court a signal opportunity, which it is urged that it embrace, to insure that the Congressional policy evinced in the Communications Act is implemented and not aborted by an "easy" adminis-

trative practice born of overriding concern for the personal financial interest of the broadcaster to the detriment of the public interest. The entire face of broadcasting can be altered thereby to the public good.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT W. LUCAS
JOSEPH B. FRIEDMAN
1028 Connecticut Ave., N. W.
Washington, D. C. 20036
Attorneys for Petitioner
South Florida Television
Corporation

October 5, 1965